

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Tariff Filing Requirements for ) CC Docket No. 93-36  
Nondominant Common Carriers )

**Reply Comments of the Custom Network  
Service Users Group**

The Custom Network Service Users Group, whose members are large users of interstate interexchange services and include customers of all of the major interexchange carriers, file these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released February 19, 1993 in this docket.

The Commission has recently (and correctly) concluded that the market for interstate interexchange services, especially those used primarily by large business users, is characterized by "especially intense" competition. Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1990); see NPRM at ¶ 10 n.22. In these circumstances, there is a risk that regulation with too heavy a hand will hinder rather than foster the "availab[ility] ... to all the people of the United States of a rapid, efficient nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges...." See 47 U.S.C. § 151. The Commission has long understood this, and the only issues in the present proceeding are how to define and apply the regulatory requirements required by statute.

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The Commission's proposal to permit nondominant carriers to file tariffs in a simplified format on one day's notice makes eminent sense. It permits carriers to respond quickly to the demands of the marketplace and, more particularly, to the needs of their customers.<sup>1</sup> With one critical exception discussed below, the proposal does not deprive customers of protection against unlawful or unreasonable carrier tariffs, as customers will continue to have full access to the Commission's complaint process, which has recently been reformed to ensure a more prompt resolution of claims.<sup>2</sup>

There are, however, several additional steps the Commission should take to ensure that the carriers' tariffs do not stand in the way of the normal functioning of the competitive marketplace. First, tariff terms must be set out clearly and with specificity so that customers are informed of their rights and obligations. Second, changes in tariffs must be indicated clearly by the carrier, whether by marking the new or revised material or by drawing the reader's attention to it in some other manner. Third, the Commission must ensure that adequate facilities are available at the Commission's offices to permit customers to examine tariffs filed in machine-readable form.

Finally, with respect to contract tariffs, the Commission must ensure that tariffs do not become a means by which carriers avoid living up to

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<sup>1</sup> While the particular means selected by the Commission to carry out its policy in the Competitive Carrier rulings were invalidated in AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), the policy goals of the proceeding were valid 14 years ago and are equally valid today. See Policy and Rules Concerning Rates for Competitive Common Carrier Services, 85 FCC 2d 1, 30 (1979) ("to enable [nondominant carriers] to respond to the demands of the competitive marketplace with a minimum of regulatory interference"). Indeed, the Court acknowledged that it "had no quarrel with" those policy goals. 978 F.2d at 736.

<sup>2</sup> See Rules Governing Formal Complaints Against Common Carriers Amended, Report No. DC-2368 (March 12, 1993).

the bargains they have struck with customers under long-term agreements. Toward this end, the Commission should require advance notice of any revision in a contract tariff that raises the rates or alters a material term of the negotiated arrangement without the consent of all affected customers. The notice period should be of sufficient length to permit the customer to request the Commission to institute an investigation of the lawfulness of the proposed tariff change.<sup>3</sup> Further, the Commission should reaffirm that, in such an investigation, it will apply the principle that any ambiguity in a tariff will be resolved "against the framer and favorably to users."<sup>4</sup> Finally, the Commission should require that contract tariffs include a provision stating that, in the event that a change in a rate or other material term takes effect without customer consent, the customer may, at its sole option, terminate without liability.<sup>5</sup>

The doctrine under which tariffs take precedence over contracts creates an anomaly in the context of contract tariffs which distorts the marketplace,<sup>6</sup> a result precisely contrary to the Commission's goals. Short of abrogating that doctrine, the Commission can accomplish the desired result by ensuring that customers have the regulatory tools to require all service providers

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<sup>3</sup> See Comments of the Ad Hoc Telecommunications Users Committee at pp. 13-15 (proposing that the Commission find a unilateral tariff modification lawful only where general principles of contract law would permit the abrogation of a contract).

<sup>4</sup> The Associated Press, 73 FCC 2d 760, 765 (1979).

<sup>5</sup> See Comments of Tele-Communications Association at pp. 7-8; AT&T Tariff F.C.C. No. 12, § 7.2.17.A.1 and .2 (permitting customers to terminate without liability where tariff revisions increase the applicable rates or otherwise

engaged in contract carriage -- both dominant and nondominant -- to fulfill their obligations under the negotiated arrangements.

In sum, the tariff filing requirement should serve, not hinder, the Commission's legitimate policy goal of fostering competition. In the custom network service segment of the market, the Commission should ensure that the requirement serve as neither a sword nor a shield for carriers vis-a-vis their customers.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ellen G. Block".

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Dated: April 19, 1993

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## CERTIFICATE OF SERVICE

I, Ellen G. Block , hereby certify that true and correct copies of the foregoing **REPLY COMMENTS OF THE CUSTOM NETWORK SERVICES USERS GROUP** were served this 19th day of April 1993, by hand delivery or first class mail, postage prepaid, to the parties on the attached list.

  
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